IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S
MOTION FOR ACCESS TO CLASSIFIED MATERIAL

Under the guise of a "Motion to Get Access to So Called Secret Evidence" (docket no. 385, but see also docket no. 386), the defendant has now apparently moved for access to classified material. Defendant's motion should be denied. Defendant cannot have access to classified information because he does not have a security clearance, and there is no requirement, constitutional or otherwise, that overcomes the Government's strong interest in not disseminating classified information to the defendant. Further, the defendant in exercising his Faretta right, was advised that should he waive counsel, he still would not have access to classified material.

As a preliminary matter, the defendant apparently justifies his request by asserting that the Government is classifying all pertinent information in this case. This is simply false. The great bulk of discovery material in this case is unclassified. Moreover, for the material that is classified, defendant's interests are being protected in the following manner: (1) the Government has produced a substantial amount of classified discovery to cleared standby defense counsel and additional classified material to the Court under CIPA § 4; and (2) standby counsel continue to review and litigate access to and use of classified discovery at trial under CIPA.

The defendant similarly asserts that he has a right "to material that prove that I am not 9/11." The Government understands its Brady obligations and will meet those obligations in this case. First, we believe that there is no such material. As we have previously asserted, there is no core *Brady* material among the classified information produced in this case. As noted above, much of the classified information has been produced to the Court for its review under CIPA § 4. Moreover, standby counsel has been provided classified discovery and the CIPA process is ongoing. Thus, classified information that is relevant, admissible, and essential to the defense (United States v. Smith, 780 F.2d 1102, 1110 (4th Cir. 1985)) will eventually be transmitted to the defendant in some unclassified form, including declassified information, summaries, substitutions, or stipulations, or the Court may sanction the Government, all as provided under CIPA.[1]

The Court has issued a Protective Order, dated January 22, 2002, providing that: "No defendant . . . shall have access to any classified information involved in this case unless that person shall first have: a. received the necessary security clearance . . . ." This Order is in full accord with CIPA, and the Court has authority to do this, *inter alia*, under CIPA § 3[2] and Rule 16. [3]

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[1] The defendant's core Faretta right, to present his case to a jury, will thus also be preserved.

[2] A court has the authority to "issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States." CIPA section 3.

[3] Pursuant to Fed. R. Crim. P. 16(d)(1), which governs the use of protective orders in discovery in criminal cases, a court "may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate." "In determining

1. The Defendant Is Not Entitled to Receive Classified Information.

Denying the defendant access to classified information is lawful, as it promotes compelling government interests. Indeed, similar CIPA-based protective orders that deny uncleared defendants access to classified information have been upheld. In United States v. Bin Laden, 2001 WL 66393 (S.D.N.Y. 2001), the claim that such a protective order was unconstitutional was rejected by Judge Sand in the trial of *al Qaeda* defendants charged with the bombings of the U.S. embassies in East Africa. In upholding a protective order barring defendant terrorists from reviewing classified materials, Judge Sand rejected the claim that such a protective order, and CIPA generally, violate a defendant's Sixth and Fifth Amendment rights, in light of "the Government's compelling interest in restricting the flow of classified information and in light of the weight of precedent endorsing similar restrictions . . . ." 2001 WL 66393, *4. See also United States v. Rezaq, 156 F.R.D. 514, 525 (D.D.C. 1994)(upholding protective order barring classified information from defendant terrorist), vacated in part on other grounds, 899 F. Supp. 697 (D.D.C. 1995).

Indeed, limitations on the defendant's access to classified and other sensitive information, as well as identifying information about the venire and witnesses in this case, protect both valid national security and public safety interests and are the type of restrictions that the courts routinely have upheld. See Smith v. Illinois, 390 U.S. 129, 131 (1968) (permitting Government to withhold witnesses' addresses); Roviaro v. United States, 353 U.S. 53, 59-62 (1957)

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whether such restriction is appropriate, district courts may consider, *inter alia*, 'the protection of information vital to the national security.'" United States v. Lindh, 198 F.Supp. 2d 739, 741 (E.D.Va. 2002).

(permissible to withhold informant's identity from defendant); Morgan v. Bennett, 204 F.3d 360, 367 (2d Cir. 2000) (upholding trial court's order that counsel not share timing of witness' testimony with defendant-client), cert. denied, 531 U.S. 819 (2000); United States v. Thai, 29 F.3d 785, 800-01 (2d Cir. 1994) (upholding use of anonymous jury); United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989) (Government's interest in protecting details about methods used to intercept communications outweighed defendant's discovery rights); United States v. Smith, 780 F.2d 1102, 1108 (4th Cir. 1985) (Government has "substantial interest in protecting sensitive sources and methods of gathering information"); United States v. Truong, 667 F.2d 1105, 1107 (4th Cir. 1981) (no denial of Sixth Amendment right to counsel where defense counsel, and not defendant, permitted to examine documents before Jencks Act rulings); United States v. Pelton, 578 F.2d 701 (8th Cir. 1978) (affirming district court's decision to withhold tapes of defendant to protect identity of cooperating witness); United States v. Anderson, 509 F.2d 724, 730 (9th Cir. 1974) (access to *in camera* hearing only to defense counsel).

2. The Government Has Compelling and Well-Established Security Reasons for Denying Defendant Access to Classified Information.

By definition, the Government has compelling national security reasons for maintaining the secrecy of classified information. In this case, additional national security concerns are patent.

As detailed at length in the Government's Memorandum in Opposition to the Defendant's Motion for Relief from Prison Conditions, dated April 17, 2002, *al Qaeda* has engaged in a declared war against United States civilians during the last several years. Adherents to *al Qaeda*, including, as he has admitted in open court, the defendant, believe it is their duty to kill

American civilians anywhere in the world they can be found. To that end, *al Qaeda* has trained its followers in assassination techniques, the use of weapons, the use of codes to communicate messages, even from within prison, and has instructed them to continue the holy war (*jihad*) even after capture. Moreover, Usama Bin Laden, the undisputed leader of *al Qaeda*, has called for continued attacks against American targets to release "brothers" detained in American jails. The defendant's pleadings, calling for continuing the *jihad* against the United States, bear this out.

Thus, this trial and the defendant present unique security challenges. Aside from the risk of physical harm to the participants in the trial, the unnecessary disclosure of the information collected against *al Qaeda*, including the sources of that information and the methods used to collect it, could undermine national security interests. Not only is the law enforcement component of the Government continuing its investigation of *al Qaeda*, but other elements of the Government are pursuing alternative means of neutralizing *al Qaeda* members and associates around the world. See United States v. Lindh, 198 F.Supp. 2d 739, 742 (E.D.Va. 2002) (Ellis, J.) (recognizing "the nature of al Qaeda and its activities, and the ongoing federal law enforcement investigation into al Qaeda" in restricting access to detainee interviews.) Thus, it is vital to protect, as much as is practical, against the premature disclosure of information related to this case. See United States v. Bin Laden, 58 F. Supp. 2d 113, 121 (S.D.N.Y. 1999) ("The concerns [of premature disclosure of classified information] are heightened in this case because the Government's investigation is ongoing, which increases the possibility that unauthorized disclosures might place additional lives in danger.").

Accordingly, the Court has properly imposed the Protective Order for classified information, which denies classified information to the defendant unless he is cleared to receive

it. One critical component of such a protective order is the perception of other governments and agencies that share sensitive information with our government that their interests will be protected. See Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."); Bin Laden, 58 F. Supp. 2d at 121 (stressing importance in preventing release of classified information).

Restrictions on the dissemination of classified information to an admitted *al Qaeda* member and avowed jihadist such as the defendant protect both valid national security and public safety interests.

3. Defendant Was Warned When He Waived Counsel That He Would Not Have Access to Classified Material.

Nor does defendant's *pro se* status alter the calculation that the compelling interests of the government in protecting national security information and protecting against future terrorist activity by *al Qaeda* outweigh the defendant's desire to see classified discovery. In a lengthy *Faretta* hearing, the defendant was warned that he would not have access to classified information when he waived his right to counsel. See June 13 Tr. at 35. Put simply, the defendant's *pro se* status is not preventing him from seeing the materials, rather it is the fact that he is not cleared.

4. Conclusion

For the foregoing reasons, the defendant's motion for access to classified information should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on August ____, 2002, a copy of the attached Government's Opposition to Defendant's Motion for Access to Classified Material was sent by hand delivery, via the United States Marshal's Service to:

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I further certify that on the same day a copy of the same attached pleading was sent by facsimile and regular mail to:

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